certainly was a policy. It is the denial of the existence of the policy that is the embellishment. Ms. McKernan was offered up as a good soldier to tske a bullet for Verizon so that the operating company could maintain the facade of plausible deniability. This eleventh-hour about-face is the hallmark of fabrication. Quite simply, in the words of a former U.S. President:

THAT DOG DON'T **HUNT.**

Further evidence that Ms. McKernan's story was fabricated after the fact are the numerous "cc's" on the several e-mails between Mr. Lesser of North County and Ms. McKernan. If Ms. McKernan was embellishing a policy where none existed, why would there be complete silence from all of these people? NCC Exhibits 3-C-032 to 036 indicate the following individuals were carbon copied on the e-mails talking about the policy: Cynthia Robinson (Manager, CLEC Implementation, Potornac States), Evon Tabron (Project Manager, Verizon Communications), Steven H. Hartmann, Verizon's in house counsel), Pamela J. Cunningham, Donna Walker, Jimmy M. Borne, Emory A. Brown, Dorothy M. Sapp (Specialist, Verizon Wholesale Markets), and Manpreet S. Matharu (Specialist, CATC-Switched Access Provisioning). The fact that Verizon's attorney, Mr. Hartmann, was copied and said nothing is a clear indication that he saw nothing wrong with communicating this policy to those trying to get into the market. He can not be heard to complain that he did not know what the term "policy" meant, nor can he be heard to complain that he was unaware that such a policy was being enforced

against Verizon's competitors. Thus, Verizon's own legal department is in full complicity in this plainly anti-competitive, deceptive and unlawful practice.

No credible witness in this matter believes that there was no "policy." Staffs expert Danny Walker, spoke out against it in his rebuttal testimony.[1] He was asked:

> ARE THERE ANY OTHER PROBLEMS STAFF HAS WITH VERIZON-WV'S "POLICY" OF REFUSING TO INTERCONNECT AT END USER LOOP FACILITIES?
>
> Yes. Staff believes that the cost associated with build outs of new infrastructure in response to every CLEC request for interconnect is unnecessary. and that a more cost effective - certainly less time-consuming - alternative is to allow CLECs to interconnect at end user loop facilities where sufficient capacity exists. In Staffs opinion, this would hold true even if Verizon WV had to modify the end user facilities in order *to* accommodate the CLEC's forecasted traffic.

Staff Ex. 1: 9.

And this was ***after*** Mr. Walker had testified that: he agreed that Verizon should have "accommodated NCC's original request to interconnect" at the shared facility (Id. : 3); Verizon "unreasonably refused to interconnect with NCC" (Id. 5); Verizon's justification for its refusal *to* accommodate NCC's interconnection request was "simply unsustainable" (Id.); and afler confirming that the standard relied upon by Verizon (that it could be judged according to the time it takes to interconnect with other CLECS) is contrary to law insofar as the FCC rules require ". . . an ILEC to provide interconnection

[1] Mr Walker had all of the parties direct testimony before taking his position in his rebuttal testimony

to a CLEC in a manner no less efficient than the manner in which the ILEC provides the comparable function to its own retail operations." (Id. : 8). Even after hearing Ms. McKernan's "story" he did not change his prefiled testimony with regard to the existence of the "policy" In fact, Mr. Walker summarizes his position on page 11 of his rebuttal testimony with this scathing assessment of Verizon's conduct:

> Staff is troubled by Verizon WV's unilateral adoption of apparently unwritten policies, such as the one involved in this proceeding, i.e., the refusal to interconnect with CLECs at end user facilities where sufficient capacity exists.
>
> It appears to Staff that Verizon-WV, consciously *or* unconsciously, used its monopoly position in the local marketplace in West Virginia to obstruct and delay a potential Competitor's entry into that marketplace.

Is there really any debate over the existence or effect of this policy?

Even if "the biggest mistake of [Ms. McKernan's] career" truly were the "little fib" she made up to impress Mr. Lesser, it wouldn't help matters for Verizon. 47 C.F.R. § 51.305 (g) mandates that an ILEC shall provide to a requesting telecommunications carrier technical information about the ILEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of 47 C.F.R. § 51.305. It is a violation of the duty to negotiate in good faith for an ILEC to refuse to provide information about its network that a requesting telecom carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer. In addition, it is a violation for any carrier to intentionally obstruct

or delay negotiations *or* resolutions of disputes, or to refuse to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues. 47 C.F.R. § 51.301(c)(6), (7), (8) (i).

NCC submits that there is no practical difference between an ILEC that refuses to provide necessary information that a carrier needs and an ILEC that feeds a requesting carrier false information through its duly authorized and acknowledged representative. ***The significance of this issue cannot be understated, because whether the policy was merely an illegal and anti-competitive policy or whether it was a non-existent policy designed to mislead, its emergence in this case in early 2001 tainted the entire interconnection process that followed.*** The place of the handbook vis-a-vis the ICA, the alleged inadequacy and untimeliness of the forecasts, the format in which Verizon received information . . . all these trial balloons which Verizon floated throughout the hearing 'were, io borrow a phrase from criminal law, "fruit of the poisonous tree," tainted by what came first---the policy — and what NCC had to deal with throughout this process and beyond. In light of the policy, none of Verizon's other purported concerns mattered

***The* Key** Points

An ILEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible. 47 C.F.R. § 51.305 (e)

Verizon denied NCC's request for interconnection at a loop facility located at 405 Capitol Street. Verizon insisted that its policy in dealing with carriers required the construction *of* a dedicated interoffice facility

Ironically, Verizon cannot dispute that interconnection, as requested, was technically feasible as ultimately, interconnection did take place at the loop facility as requested, albeit six months later.[12] In essence, what Verizon seems to argue for is based upon the notions of capacity, and ultimately how that would somehow affect Verizon's notions of sound engineering and network reliability.

A determination of technical feasibility does not include considerations *of* economic, accounting, hilling, space, or site concerns, except that space and site concerns may be considered in circumstance where there is no *possibility* of expanding the space available. Local Competition First Report and Order, ¶ 198. ICA, Am. No. 1, Part B, Page 9. Verizon has made no such claim, and as noted, the interconnection ultimately went through at the existing facility. The fact that an ILEC must modify its facilities or equipmentto respond to such request does not determine whether satisfying such request is technically feasible. Id. Here, no modification was required. Once again, technical infeasibility, the sole reason for denying an interconnection request, does not exist.

Lastly, to the extent Verizon claims some sort of "network reliability" issue, it has failed to carry its burden. It must connect the specific interconnection requested by

[12] Of course only as a 'courtesy' Verizon *Ex* 4-D, *2* 6-8

NCC with adverse network reliability impacts which are *both* specific *and* significant. Vague notions and arcane jargon do not meet the standard, let alone satisfy it by the requisite clear and convincing evidence standard. Verizon's alleged concerns are vastly overstated, would have posed no problem if NCC's customer had remained a Verizon customer, and are belied by the fact that in the year-plus in which NCC has been located at the Capitol Street loop facility, there has been no evidence of *any* network outages tied to NCC's interconnection, let alone specific ones. All of the fiber mux's use the identical equipment and the exact same fiber optics. Tr., Vol. I, 265-266. Tr., Vol. II, 151-152, 155-157 NCC **Ex.** 6: 9, 11. In sum, there is no issue of technical feasibility which would have prevented or delayed the interconnection as requested.

Equal in Quality

Interconnection that is "equal in quality" requires, at a minimum, that an incumbent design facilities to meet the same iechnical criteria that are used within the ILEC's network. Service quality is viewed not only from the perspective of the end-user, but also the CLEC. So, if NCC's customer, KVI, is able to pick up space at a loop facility at Capitol Street if it remained a Verizon customer, why can't NCC? Would NCC view this situation as being "equal in quality"? Not even close.

At hearing, Mr. Albert mentioned four interconnections with CLECs he was involved with that took place at loop facilities. **An** in-hearing request was made for various documents related to these four experiences. Response of Verizon West Virginia, Inc. to Record Data Request. In typical fashion, Verizon elected to throw in two

extra sets of documents which were NOT requested, namely exhibits E and F to the Albert post-hearing exhibits, as well as non-responsive e-mails and an affidavit from the elusive Mr. Bartholomew, whom Verizon elected not *to* produce at trial. As we know, Mr Albert has also chosen to deny the existence of the policy, instead preferring to rely upon the practice. However, what we learned from his post-hearing exhibits, particularly in Attachments A-2 and D-2. is that there is a policy, but that *exceptions* evidently can be made to the policy. Evidently if a CLEC is at risk for losing its NXX codes, the Verizon will consider making the "interim arrangement" exception, which, ironically, is what NCC had been requesting all along, so it could just get up and running. Nobody ever offered NCC the case-by-case practice or the interim arrangement option

If Verizon was willing to offer NCC a space on the loop facility when he was on the verge of losing his codes, why wasn't it willing to do the same six months sooner? Should a CLEC have to be at risk for losing its codes before it gets some prompt action from Verizon? It is beyond the pale of reason to think that Congress, the FCC, the West Virginia legislature, and this Commission meant for "equal in quality" to mean something along the lines of "equally inept, inefficient, and unacceptable."

> The Federal requirements involved here cannot mean that ILECs may delay interconnection with competitors as long as they delay interconnection with all competitors indefinitely. Nor can the Federal requirements mean that ILECs can retard their own system so they can retard competitors systems. The burden of the Federal requirements is that ILECs should not discriminate between competitors and non-competitors when providing interconnection, but provide that interconnection in a timely fashion.

Attachment to NCC's Answer to Counterclaim, In the Matter of the Complaint of Core Communications v. Verizon Maryland, Case No. 8881, Hearing Examiners Ruling on Interlocutory Motion, dated March 25, 2002, at page 21.

Just, **Reasonable. and Nondiscriminatory**

Time is of the essence to a CLEC. As a result ILECs should be flexible in accommodating initial orders from CLECs on an interim basis and with all possible haste. Tr. Vol. III, 219. Section 51.305 (a) (5) of Title 47 of the Code of Federal Regulations makes it crystal clear that the time it takes for an ILEC to provide interconnection is indicative of whether the interconnection is being provided in a just, reasonable. and nondiscriminatory manner.

At hearing, Mr. Albert acknowledged that if KVI had requested 2 DS3s, Verizon would have given KVI what it could and then would have started building more facilities. Tr..Vol III, 151-152, 155-157. If KVI only needed two more T1s, it could have had them in as little as 15 days. If NCC had requested the exact same T1s, it could expect to wait six months. Why? After all, a TI is a TI. The reason. . . because NCC is a competitor and Verizon is in no hurry to help. Indeed, this is directly contrary to the language of the ICA, which provides in section 4.1.1 that

> The Parties shall work toward the development of their forecasting responsibilities for traffic utilization over trunk groups. Orders for trunks that exceed forecasted quantities for forecasted locations will be accommodated as facilities and/or equipment are available. Parties shall make all reasonable efforts and cooperate in good faith to develop

> alternative solutions *to* accommodate orders when facilities are not available. . . .

Translation: Get the CLEC up and running where it wants and no "policies," real, feigned, or otherwise may be heard to interfere with that goal.

The time it takes to get the CLEC up and running must be just and reasonable and nondiscriminatory. Verizon's performance in this instance failed miserably on all three points

***

In closing it seems appropriate *to* return to Ms. Givens suggestion that Verizon West Virginia has no motivation to delay interconnection because it would then be denied long-distance approval. Of course, the long-distance approval would go *to* another affiliate: West Virginia consumers and CLECs would still be left to deal with Verizon West Virginia and the inept Verizon Services Corp. The simple truth is Verizon has plenty of motivation *to* delay interconnection as demonstrated by Steve Molnar, the Staff Economist at the Maryland PSC:

> The immediate benefit to an incumbent carrier is that delayed entry creates additional costs for competitors. The fact that the competitor cannot operate and earn revenue while it continues to incur expenses only adds to the disadvantage that a new CLEC faces. The longer the delay, the greater the cost the incumbent carrier can impose and the less likely that the competitor will have success in the long run. In addition, *if* the competitor *has* a business plan that targets certain customer groups, then the incumbent

can market its services more aggressively during the period of delay

NCC Ex. 3-L

Ultimately, whether some, all, or none of these factors impacted or applied to NCC is not the immediate question at hand. The immediate question is the legality of Verizon's conduct under § 24-2-7, as guided by the state and federal regulations, and what the Commission can do to ensure that Verizon's conduct is not repeated.

IV.

THE **555 ISSUE**

In this case, a customer of NCC with a 555 number approached NCC about getting service for his number. When NCC contacted Verizon , Verizon initially agreed to transport the calls and route them to NCC; but the next day reneged, claiming it was technically infeasible due to translation problems with the routing of the calls. In addition, Verizon informed NCC of a policy that it had which treated all 555 traffic as access calls, for which NCC would have to pay access fees to get the calls routed to it. In this instance, Verizon violated West Virginia Code § 24-2-7 and Telephone Rule 15.1(a) (3, **4),** which requires all local exchange carriers to provide dialing parity to competing local exchange carriers and permit all competing local exchange carriers to have nondiscriminatory access to telephone numbers.

A New Policy

The ATIS guidelines make clear that 555 numbers may be treated as local calls or access calls. NCC Ex. 3-N. The choice is up to the Commission.

Verizon advertises its "Enhanced ISDN-PRI Hubbing Service on its web site. NCC Ex. 5: 24. With this service, Verizon can offer one LATA-wide number to Internet service providers using 555 numbers and callers will only be charged for local calls. Verizon is attempting to sell a retail service using 555 numbers but denying an equivalent use for competing 555 numbers provided by CLECs. By refusing to route calls as local calls to CLECs and forcing them to pay access if they want their customers to receive these calls, discrimination results. If CLECs have to pay access, there's no way they can be competitive with Verizon on the same service. When Verizon defined the service as local for themselves, they defined it as local for all competitors as well. By approving this product as local, the Commission should do the same for all carriers, or prohibit Verizon from charging message units, as access services cannot charge message units. This is the only way to ensure nondiscriminatory treatment. Verizon's offer to allow North County to "purchase" the service from Verizon and re-sell it is not a legitimate option, as needless to say, in such a circumstance, North County could not compete on an equal footing.

The alternative would compel NCC *to* obtain NXX codes in every central office. Tr., Vol. I, 96. It is *most* unlikely that NCC would succeed in such a venture, because numbers are assigned by lottery and NCC has no guarantee that it would receive the

necessary codes Id. Even if successful, the eventual result would be an area code split. a result undesirable to all West Virginia consumers. Id. Finally, this is of no use *to* ISP customers who want to use a single number throughout the LATA.

In support of Verizon's position, Mr. Peter D'Amico "was volunteered." Conceding that this issue was not really his expertise[13], Mr. D'Amico was unfamiliarwith the PRI hubbing service and unfamiliar with the retail side of Verizon's operations.[14] Describing 555 as "non-geographic," he felt that non-geographic numbers should always be local, but he was unaware of any document supporting such an opinion. Tr., Vol. III, 9, 19, 20-21, 29, 41. The interconnection agreement appears to be silent on the particular question of 555 numbers but it does define what non-geographic means:

> ". . . typically associated with a specialized communications service which may be provided across multiple geographic NPA areas; 500, 800, 900, 700, and 888 are examples of non-geographic NPAs." ICA, Am. No. 1, Part A, Page 6.

No mention is made of 555 being non-geographic. Also noticeably absent from Mr. D'Amico's testimony was any mention *of* why treating 555 calls as access would be a more favorable result for West Virginia consumers. In addition to preventing area code splits, a topic on which Mr. D'Amico had no opinion, treating 555 numbers as local would give consumers 7-digit dialing which they prefer.

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[13] Ms. Givens also confessed to no expertise in the 555 arena. Tr.. Vol. II, 80

[14] Mr. D'Amico's opinion came down to "I know local and this **Isn't** local."

V.

TARIFF-BASED LIABILITY AND BAD FAITH DETERMINATION

In the Third Count of its complaint, NCC alleges that the Commission should declare Verizon's acts to be illegal, and armed with such a finding, it was NCC's intent to seek damages in circuit court. NCC recognizes that the Commission has no statutory authority to award damages or attorneys' fees. However, the Commission does have authority under § 24-2-7 to make any other such order as may be just and reasonable, in addition to interpreting tariffs and ICAs which the Commission has approved, as part of its general oversight of the telecommunications industry in West Virginia. Section 12 of the ICA provides for liability in the event of willful or intentional misconduct, including gross negligence. Verizon's W.V. Tariff No. 201, Section 1, Part E.6, likewise provides for liability in the event of gross negligence, willful neglect, or willful misconduct.

NCC submits that In the Matter of New York Telephone Company v. Public Service Commission of the State of New York, 179 Misc.2d 301, 684 N.Y.S.2d 829 (1998), aff'd 271 A.D.2d 35, 707 N.S.Y.2d 534 (3d Dep't. 2000), supports this Commission's exercise of jurisdiction to make a determination of gross negligence and/or willful misconduct on Verizon's part. There, the ALJ found Verizon's affiliate had engaged in long-term deception of the complainants and the New York PSC, as well as striving to cover up its negligence, defeat efforts to call it to account, and extended to the company's litigation abuses, leading to a finding *of* willful misconduct. In addition, inadequate planning and preparation, as well as inadequate handling of troubles when

they arose evidenced gross negligence. The New York PSC agreed with and adopted the ALJ's findings and conclusion of gross negligence and willful misconduct. 684 N.Y.S.2d at 833.

In reviewing the PSC's decision, the trial court found that the PSC, like this Commission, possesses only those powers expressly delegated to it by statute, or incidental to those express powers, together with those required by necessary implication to enable it to fulfill its statutory mandate. Similar to the broad powers contained in West Virginia Code § 24-2-7, the New York Public Service Law grants the PSC general supervisory power and broad investigative and oversight authority. The trial court found that the PSC's findings of gross negligence and willful misconduct did not relate solely to the issue of liability for damages, but was properly made in the context of its power to review complaints regarding a regulated utility's service, conduct and tariff-based charges, as well as its general oversight and regulation of the industry Accordingly, the findings did not relate solely to liability for damages and would not be dismissed merely because it might have some effect on a future action for damages. *Id.* at 834-835. In terms of the sufficiency of the evidence, Verizon's affiliate failed to handle the situation responsibly, failed to acknowledge its lapse, failed to act responsibly to undo the damage, failed to take steps to forestall its repetition, failed to act expeditiously in cleaning up its mistakes (instead focusing its efforts on covering them up), failed to plan properly, failed to respond properly or to notify the affected parties, and disregarded the consequences of its actions. The Verizon affiliate did not

possess any concern for the consequences of its conduct, engaging in gross negligence/willful misconduct, defined as "conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing." *Id.* at 835.

The appellate department upheld the decision, finding that the PSC, which was charged with interpreting and enforcing the tariff, was authorized to determine if [Verizon's] conduct rose to the level *of* culpability specified therein.

> We simply cannot envision a legislative scheme that would empower an administrative agency to investigate a matter, yet would preclude it from issuing findings of fact regarding an issue inherent therein, i.e. [Verizon's] potential liability as defined in the tariff.

707 N.Y.S.2d at 537

Here, Verizon attributed delays to the alleged investigation *of* non-issues; failed to have plausible explanations, or any explanations at all, for large blocks of time, delayed filing the ICA with no plausible explanation; produced witnesses who were unfamiliar with the transaction or the appropriate expertise; failed to provide witnesses with personal knowledge of the facts; developed a policy which violated the Telecommunications Act, the interconnection agreement, FCC regulations and long-standing FCC orders, Commission Rules, and ultimately § 24-2-7 of the West Virginia Code; attributed its position to large volumes of CLEC traffic when it did not have the information to support such a conclusion; waited until NCC was on the verge of losing its NXX codes before offering an alternative arrangement; and never informed NCC of

the "alternative arrangement" exception to the policy or the existence of the alleged case-by case policy. A finding of gross negligence and willful misconduct is only fair and appropriate.

Such a finding also would support an effort by NCC *to* recover the considerable attorneys' fees it has expended in bringing this matter to the Commission's attention. Under West Virginia law, absent statutory or contractual provision, each party bears his own attorneys' fees. However, there is authority in equity to award to the prevailing litigant his or her reasonable attorneys' fees as costs, without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Midkiff v. Huntington National Bank West Virginia, 204 W. Va.. 18, 511 S.E.2d 129 (1998). Again, NCC is not asking the Commission to award attorneys' fees, but merely to make the requisite finding, based upon its expertise in utilities matters, so that NCC may make an application in the appropriate court.[15] Such a finding would be completely consistent with the findings of gross negligence and willful misconduct.

[15] Unfortunately, Verizon's bad faith has not been limited to the underlying facts, but has run throughout the litigation itself. Some misdeeds include (a) defense counsel's request, in his very first correspondence *to* the Commission, that NCC's out-of-state counsel stipulate that they will behave civilly, when there was no cause to suspect counsel would behave otherwise; **(b)** spurious objections to discovery which **led** to multiple motions to compel being granted *in toto;* (c) making post-hearing filings which were not requested; (d) failing to consent to depositions and then filing post-hearing affidavits from individuals who didn't file pre-filed testimony or appear at trial: and (e) pre-filing direct and rebuttal testimony of a key witness, after opposing her deposition, which omitted key testimony on the origins of the "policy" in an effort to sandbag North County in this proceeding.

VI.

CONCLUSION

Based upon the foregoing, complainant NORTH COUNTY COMMUNICATIONS CORPORATION respectfully submits that the Commission should rule in its favor on all issues in controversy and issue findings of fact and concluston of law consistent therewith, as submitted hereinafter.

Respectfully submitted,

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EXHIBIT E

EXHIBIT B

BEFORE THE
PUBLIC SERVICE COMMISSION
OF **WEST VIRGINIA**

CASE NO. **02-0254-T-C**

NORTH COUNTY COMMUNICATIONS CORPORATION,

Complainant,

v.

VERIZON WEST VIRGINIA, INC.,

Defendant.

NORTH COUNTY COMMUNICATIONS CORPORATION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF **FACT**

INTERCONNECTION

1. North County Communications Corporation ("NCC") was duly certificated as a competitive local exchange carrier ("CLEC") pursuant to an order of this Commission in Case No. 00-0502-T-CN (July 21, 2000 Recommended Decision, Final August 10, 2000).

2. Verizon West Virginia, Inc. is the incumbent local exchange carrier ("ILEC") for most of West Virginia. Verizon Services Corporation provides interconnection services to various regional Bell operating companies in the Verizon territory throughout the United States, including Verizon West Virginia, Inc. Tr., Vol. III, **194-195**. Unless otherwise specified, Verizon West Virginia, Inc. and Verizon Services Corporation shall be referred to collectively as "Verizon."

3. On April 4, 2000, NCC contacted Verizon by telecopier to begin the interconnection process. NCC received no response. NCC Ex. 3-A, April 4,2000 letter; Tr., Vol. I, **44-45.**

4. On July 5, 2000, NCC again contacted Verizon by telecopier to begin the interconnection process. Specifically, NCC chose to opt into an existing Commission-approved agreement between Verizon and MCI Metro. NCC Ex. 3-A, July 5, 2000 letter. Again, NCC received no response. At hearing, Verizon alleged for the first time that it delayed responding because it claimed to be investigating NCC's operations in California concerning a "chat-line" issue. Tr., Vol. I, 39-40; Vol. II, 91-94. No sufficient evidence was presented to justify the alleged investigation and the corresponding delay it caused in having the interconnection agreement ("ICA) approved.

5. On August 18,2000, NCC provided Verizon with a completed Information Request Form and Customer Profile Form for the State of West Virginia. NCC Ex. 3-A, August 18, 2000 letter. NCC re-sent this information on a number of occasions thereafter, as well. Tr., Vol. I, 51

6. Sometime on or before September 6, 2000, Verizon concluded its alleged investigation into the chat-line issue and submitted *to* NCC by regular mail an adoption letter for NCC's execution. NCC Ex. 3-B, September 6, 2000 letter. Tr.. Vol. II, 72. *NCC* returned the dulyexecuted letter to Verizon by Federal Expresson September 22, 2000, along with instructions to file the ICA with the Commission as soon as possible. NCC Ex. 3-B, September 22, 2000 letter.

7. Verizon did not file the ICA promptly. Verizon conceded it had no explanation for no less than two months of inactivity which followed. Verizon did not file the petition with the Commission for approval until January 19, 2001. Tr., Vol. II, 73; Staff Ex. 1, p. 11; Case No. 01-0167-T-PC.

8. NCC had been an existing customer of Verizon in New York where NCC was a long-distance carrier for the past 10 years. Tr., Vol. I, 76. Despite the fact that NCC was an existing customer of Verizon, no one from Verizon contacted NCC until December 20, 2000, more than eight months after NCC began the interconnection process. NCC Ex. 1, p. 6.

9. Verizon Services Corporation employs Dianne McKernan as an Account Manager Verizon Ex. 2, p.1. On January 17, 2001, Ms. McKernan informed Mr. Lesser that she would be his account manager for all his Verizon needs, "coast to coast." NCC. Ex. 3-C-002. In essence, Verizon set up Ms. McKernan as the keeper of the gate through which NCC must pass if it wishes to gain entry into markets where Verizon is the incumbent. The president of Verizon West Virginia acknowledged that Ms. McKernan has the authority to bind Verizon West Virginia in her capacity as account manager and that it would be reasonable for NCC *to* rely upon Ms. McKernan's representations to him. Tr., Vol II, 112-115.

10. Ms. McKernan had no prior experience in working with CLECs seeking interconnection before she began on the NCC project and had only three days of training which she described as "quite overwhelming." Tr., Vol. II, 208, 209, 270, 272, 284.

11. Prior to the initial interconnection conference calls held in January of 2001, NCC attempted to order two T I trunks for interconnection at 405 Capitol Street in Charleston via e-mail to serve its sole customer in West Virginia, Kanawha Valley Internet ("KVI"), which, at that time was receiving service from Verizon. Tr., I, 57-58; NCC Ex. 3-E. Two T I constitutes a small initial order necessary for NCC to commence service in West Virginia. ICA, Attachment IV, ¶ 4.3.3. KVI was receiving service through an OC-3 multiplexer or "mux", a relatively large mux which can hold up to three DS-3s. A DS-3 in turn can hold 28 T1s. In January of 2001 through the date of hearing, this OC-3 had one full DS-3 of space capacity available, and one DS-3 has only been partially used. NCC Ex. 1, p. 13; NCC Ex. 5, p 12-13; Tr., Vol. III, 153-155.

12. At the time of the initial interconnection meetings between the parties, NCC had requested *two* T1s initially so that it could commence service as a CLEC, to be followed as soon as practical by 33 T1s. Tr., Vol. I, 56-58. Verizon refused to permit NCC to use the space capacity available on the existing OC-3 at 405 Capitol Street

because Verizon determined that NCC "needed to build an Entrance Facility because [NCC] could not use a non-wholesale market entrance." NCC Ex. 3-C-009.

13. Verizon consistently expressed a policy to NCC during the interconnection process that it will not use end-user loop facilities to interconnect with carriers, such as NCC, instead requiring the that all carriers interconnect with Verizon at specially-constructed, dedicated interoffice facilities ("IOF"). NCC Ex. 3-C-009, 031, 033; NCC Ex.3- F, L; Verizon Ex. 4-C, D. This policy was recently been defended by Verizon in the sister-state proceeding before the Maryland Public Service Commission, styled *Core* Communications *v. Verizon Maryland*, Case No. 8881.
NCC Ex. 3-K, p.26; NCC Ex. 8.

14. For purposes of these proceedings, "technically feasible" has the following meaning:

> "TECHNICALLY FEASIBLE" is as defined in the FCC Interconnection Order. Interconnection, access *to* UNEs, Collocation, and other methods of achieving interconnection of access to UNEs at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a Telecommunications Carrier for such interconnection, access, or methods. A determination of technical feasibility does not include considerations of economic. accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an ILEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An ILEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

15. It is technically feasible for an ILEC to interconnect with CLECs on shared loop facilities, and in fact it is more economical to do so. Staff Ex. 1, p. 6.

16. Verizon wrongfully refused to interconnect with NCC on the existing OC-3 at 405 Capitol Street when requested by NCC. Verizon should have provisioned NCC's order as it acknowledged it would have provisioned a similar order from KVI had KVI remained a Verizon customer. That is, Verizon should have provided NCC with two T-Is within 15 days, and one full DS-3 within 30 days. Verizon should than have worked

to build whatever additional facilities were necessary to fulfill NCC's requests for interconnection capacity. Tr., Vol. III, 151-152, 155-157; NCC Ex. 5, 16-17; Staff Ex. 1, p. 6.

17. Verizon does not contest that the interconnection NCC sought was technically feasible. Tr., Vol. III, 82. Verizon asserted that it declined to serve NCC in early 2001 based upon network reliability concerns. Verizon apparently does not have such network reliability concerns when its own customers seek to add interconnection capacity, as evidenced by its willingness *to* promptly add capacity for KVI had KVI remained a Verizon customer. Tr., Vol. III, 151-152, 155-157. Verizon can notrequire a network reliability study to be completed prior to interconnecting a CLEC if it does not impose a similar requirementwhen provisioning orders from its own customers. Verizon is required to demonstrate to this Commission by clear and convincing evidence that the interconnection sought by NCC would result in significant and specific network reliability impacts. Verizon has failed to carry its burden of proof on this issue, Verizon has presented no evidence of any network downtime related to the NCC interconnection at the loop facility located at Capitol Street since the interconnection went into effect on July 31, 2001. Tr., Vol. III, 191

18. Interconnection actually did take place at the facility initially requested by NCC, albeit six months after NCC's initial request for *two* T-1s. Staff **Ex.** 1, **p.** 6.

19. At the time Verizon informed NCC of its policy, it had little or no information regarding the amount of traffic NCC expected to carry which would justify requiring separate IOF facilities. Verizon Ex. 2, pp. 3-4.

20. The premise behind Verizon's policy of requiring IOF facilities for all CLEC interconnections, that carriers carry large amounts of traffic, is faulty. Many CLECs may require facilities that carry smaller volumes of traffic than those carried on large end user loop facilities. Some CLECs serve a small number of customers and the facilities needed to carry their traffic should be expected *to* be smaller than the facilities serving large business customers in West Virginia. Staff Ex. 1, pp. 7-8.

21. At hearing, Verizon denied the existence of the aforementioned interconnection policy. Tr., Vol. II, 119, 223, 241. The Cornmission finds Verizon's denial, put forth through Ms. McKernan, as simply not plausible. The overwhelming evidence shows that such a policy does, in fact, exist. The Commission finds that Verizon has gone to great lengths in attempting to cover up the existence of this policy, instead choosing to advance a new theory, namely, the "case-by-case practice" advocated by Donald Albert. Verizon's Director of Network Engineering. It is apparent that Verizon never offered NCC the option of the "case-by-case practice" throughout the interconnection process.

22. The cost associated with build outs of new IOF facilities in response to every CLEC request for interconnect is unnecessary, and a more cost effective - and certainly less time-consuming - alternative is *to* allow CLECs *to* interconnect at end user loop facilities on a share basis where sufficient capacity exists. This would hold true even if Verizon WV had to modify the end user facilities in order to accommodate the CLEC's forecasted traffic. Staff Ex. 1, p. 9.

23. Verizon has not provided interconnection to NCC that is equal in quality to that which it provides to itself or any other party on terms and conditions that are just, reasonable. and nondiscriminatory The construction *of* a separate IOF does not satisfy an ILECs obligation to design interconnection facilities to meet the same technical criteria and service standards that are used within the ILEC's network. In addition, the inherent delay associated with such construction does not satisfy Verizon's obligation to provide terms and conditions which are no less favorable than the ILEC provides itself, including, but not limited to, the time within which the ILEC provides such interconnection.

24. In particular, the delays which NCC experienced in this case demonstrate Verizon's failure to comply with paragraph 4.3.3 of Attachment IV *of* the ICA, which provides that the standard interval to provision interconnection trunk groups for orders of less than 4 T1s in 10 days. NCC initially only ordered two T1s which were not provisioned for approximately six months. NCC Ex. 3-E; Staff Ex. 1, p. 6.

25. Verizon also failed to comply with section 4.1.1 of the ICA, which provides that

> The Parties shall work toward the development of their forecasting responsibilities for traffic utilization over trunk groups. Orders for trunks that exceed forecasted quantities for forecasted locations will be accommodated as facilities and/or equipment are available. Parties shall make all reasonable efforts and cooperate in good faith to develop alternative solutions to accommodate orders when facilities are not available. . . . .

26. It appears from post-hearing submissions of evidence by Verizon in response to in-hearing requests, that if a carrier is at risk for losing its NXX codes due to the delays associated with construction *of* an IOF, Verizon may consider making an "interim services" arrangement with a CLEC that allows for a temporary interconnection at an end-user loop facility pending completion of the IOF. Response of Verizon West Virginia, Inc. to Record Data Request, Attachment A-2 and D-2, dated November 4,